STATEMENT OF DISPUTE
JACKSON PARK OU-3T-JPHC OPERABLE UNIT
DRAFT FINAL RI/FS REPORT

I. BACKGROUND

Operable Unit 3T-JPHC addresses military munitions within the residential area and adjacent intertidal area of the Jackson Park Housing Complex Superfund Site. The draft final OU-3T-JPHC RI/FS report, dated 20 October 2008, follows a long history of disputes between EPA and the Navy concerning the investigation of military munitions within this Operable Unit. In October 2005, EPA assessed a stipulated penalty against the Navy for the Navy's failure to submit a draft final RI Work Plan for OU-3T-JPHC by the FFA deadline. After the work plan was finally submitted by the Navy, EPA found it deficient and invoked informal dispute in February 2006 and subsequently formal dispute in March 2006. This dispute was resolved tentatively through a Joint Resolution Statement (JRS) signed by the EPA and Navy DRC members on April 27, 2006. Despite a Request for Reconsideration submitted by the Navy in May 2006, the JRS was reaffirmed by the DRC parties, as documented in a letter from EPA dated June 28, 2006.

The June 2006 letter from EPA acknowledged the authority of EPA and Navy staff to fill in blanks and make adjustments to the fundamental points of agreement captured in the JRS. Pursuant to this authority, subsequent staff efforts resulted in another document, known as the "Agreements and Implementation Plan" ("A&I Plan"), signed by EPA and Navy unit managers in November 2006.

Following that, in 2007, the Navy finally proceeded to carry out the RI field work for OU-3T-JPHC. In June 2008, the Navy submitted a draft RI/FS report for OU-3T-JPHC, which drew extensive comments from EPA dated August 28, 2008. The Navy revised the RI/FS report and produced the draft final RI/FS report dated 20 October 2008 – the document at issue in the present dispute. Following EPA's review of this document, EPA found that the report had been improved by the Navy's changes but that it remained deficient in significant ways. As such, EPA disapproved the report and invoked informal dispute resolution by letter dated November 24, 2008.

Efforts to resolve this dispute informally include 1) a meeting including EPA and Navy staff and legal counsel on Nov. 19, 2008; 2) an "EPA Counter Proposal" dated March 19, 2009; 3) a meeting between Navy and EPA staff and unit managers on April 29, 2009, and 4) a Navy response dated May 13, 2009. All informal efforts have failed to achieve agreement between EPA and the Navy on the proper scope and substance for the final RI/FS report for OU-3T-JPHC. Consequently, consistent with FFA Paragraphs 5.7.6 and 9.4.1, EPA hereby disapproves the Navy's draft final RI/FS report for OU-3T-JPHC and submits this written statement of dispute invoking procedures for formal dispute resolution.

II. NATURE OF THE DISPUTE

As discussed in further detail below, this longstanding dispute involves the failure of the draft final RI/FS to present the remedial alternatives and analysis required by CERCLA, the NCP, applicable EPA Guidance, and the FFA.

Specifically, the draft final RI/FS:

(1) does not include a remedial alternative that meets the requirement for an alternative in which treatment is a principal element. [NCP at 40 CFR 300.430(e)(3)(i)];

(2) does not include a remedial alternative that provides protection through engineering controls, and as necessary, institutional controls [NCP at 40 CFR 300.430(e)(3)(ii)]; and

(3) does not reflect "the product of consensus to the maximum extent possible," as required by FFA, paragraph 5.7.4.

III. WORK AFFECTED BY THE DISPUTE

Resolution of this dispute may provide additional direction to allow completion of the RI/FS report for OU-3T-JPHC. This RI/FS must be completed before completion of the Proposed Plan and Record of Decision for OU-3T-JPHC.

Resolution of this dispute will not, by itself, result in selection of a final remedy for OU-3T-JPHC. Resolution of this dispute will not necessarily delay the schedule for other Operable Units for this same facility, including OU-2, OU-3T-NHB and OU-3M.

IV. SUMMARY OF THE FACTUAL BASIS OF THE DISPUTE

Issue 1: The draft final RI/FS should include an evaluation of a remedial alternative that meets the requirement for an alternative in which treatment is a principal element.

The NCP requires that a feasibility study include, "as appropriate … a range of alternatives in which treatment that reduces the toxicity, mobility, or volume of the hazardous substances … is a principal element." 40 CFR § 300.439(e)(3)(i). For all the reasons detailed below and in Section V, including the unreliability of institutional controls in this context, it is certainly "appropriate" for the OU-3T-JPHC RI/FS to include a treatment alternative for munitions contamination. A treatment alternative to comply with this NCP requirement should "remove or destroy" munitions within the Operable Unit "to the maximum extent feasible, eliminating or minimizing, to the degree possible, the need for long-term management." *Id*.

Based on 12.6% statistical subsampling of 75,000 detected subsurface anomalies, five munitions items were detected in the subsurface during the OU-3T-JPHC RI. Statistically, based on this subsampling effort, if 100% of the detected subsurface

anomalies had been sampled, an estimated at eight times this number (i.e., 40 munitions items) would remain in the subsurface. 80% of the recovered subsurface munitions items (four out of five) were located in the inter-tidal area of the Operable Unit. As such, the treatment option to comply with the NCP must address munitions in both uplands and inter-tidal areas of the Operable Unit.

Issue 2: The draft final RI/FS should include an evaluation of a remedial alternative that provides protection through engineering controls, and as necessary, institutional controls. Alternatives presented do not provide protection through engineering controls, and as necessary, institutional controls.

The NCP requires that a feasibility study include, as appropriate, one or more alternatives that protect human health through "engineering controls, for example, containment, and as necessary, institutional controls …." 40 CFR § 300.430(e)(3)(ii). The Navy's draft final RI/FS for OU-3T-JPHC fails to include any alternative providing for engineering controls. For all the reasons detailed below and in Section V, it is certainly "appropriate" for the OU-3T-JPHC RI/FS to include an alternative providing for engineering controls to protect human health from the hazards of munitions at the Site.

The current state of the art technology for subsurface geophysical munitions detection used at this site, the EM-61 Mark II, will not consistently detect 100% of subsurface munitions at all depths for all sizes of munitions. The commonly used Corps of Engineers "11 X Rule of Thumb" for subsurface detectability based on the principal diameter of the munitions item (Nelson et al. 2008) suggest that for commonly encountered Jackson Park munitions items, 20 mm projectiles would not be reliably detected below 22 cm in depth, or 40 mm projectiles below 44 cm in depth. This suggests that under any scenario, following remedial construction, munitions may remain within the subsurface of the Site. As such, consistent with the NCP, an alternative providing for engineering controls, in addition to institutional controls, must be included in the feasibility study for OU-3T-JPHC in order to protect human health.

Issue 3: The draft final RI/FS should reflect "the product of consensus to the maximum extent possible." The alternatives included in the draft final RI/FS do not reflect consensus between the Navy and EPA to the maximum extent possible, affirmatively omitting any treatment alternative, contrary to the explicit comments of EPA.

V. DISCUSSION

A. Explosive hazards within OU-3T-JPHC cannot be presumed to be managed effectively solely through implementation of Land Use Controls (LUCs), including institutional controls and construction support.

Pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), the Jackson Park Housing Complex was listed on the National Priorities List (NPL) in 1994. As such, it is subject to the requirements of CERCLA. Among other things, CERCLA Section 120 requires that federal facilities

such as Jackson Park that are listed on the NPL must conduct a remedial investigation and feasibility study (RI/FS). 42 U.S.C. § 9620(e)(1). Regulations implementing CERCLA in the National Contingency Plan (NCP) establish requirements for the conduct of an RI/FS.

The purpose of a Feasibility Study is to evaluate potential options for the remediation of a contaminated site. *See* "Guidance for Conducting Remedial Investigations and Feasibilities Studies under CERCLA" (EPA 1988) [hereafter, "RI/FS Guidance"]. In carrying out this evaluation, the Feasibility Study must develop and evaluate *appropriat*e remedial alternatives to ensure that relevant information concerning the remedial action options can be presented to a decision-maker and an appropriate remedy selected. NCP at 40 CFR § 300.430(e). The analysis of alternatives under review shall reflect the "scope and complexity of site problems" and consider the relative significance of nine evaluation criteria to the site. NCP at 40 CFR § 300.430(e)(iii). Among these criteria is "long-term effectiveness and permanence." *Id.* § 300.430(e)(9)(iii)(C). Within this criterion is the factor of "reliability," specifically requiring evaluation of the "adequacy and reliability of controls such as . . . institutional controls that are necessary to manage . . . untreated waste." *Id.* § 300.430(e)(9)(iii)(C)(2).

Consistent with this regulatory requirement, all remedial alternatives presented in an FS must be evaluated for reliability. This specifically includes alternatives involving "institutional controls" such as the "Land Use Controls" existing and contemplated for Jackson Park. The full scope of existing or proposed LUCs for the Site appears to remain uncertain or in flux. According to the Navy project manager, "the only LUC in place or proposed at the site" is the program of "munitions education and awareness." Letter from M.S. Murphy, Navy Remedial Project Manager, to Harry Craig, EPA Remedial Project Manager (26 Jan 2009) at 3. Other Navy discussions identify two other existing or potential LUC components: "MEC construction oversight" and an advisory against shellfish harvesting from adjacent Ostrich Bay. *See* Draft Final RI/FS Report at 4-1, 4-2. Together, these existing or potential LUCs comprise "Alternative 2" for the OU-3T-JPHC Feasibility Study.

Regardless of whether Alternative 2 contains just one or all three of these LUC components, EPA disagrees that this alternative, by itself, is sufficient to effectively manage the potential explosive hazards within OU-3T-JPHC. Fundamentally, EPA believes that this alternative fails the NCP criterion of "long-term effectiveness and permanence," and in particular the factor of reliability. The LUC alternative fails the factor of reliability for several reasons that the Navy's draft final RI/FS report fails to acknowledge and evaluate. Each of these reasons will be identified and evaluated below.

1. LUCs may fail to manage explosive hazards under current land uses.

The principal, perhaps only, LUC existing or proposed by the Navy is the program for "munitions education and awareness." As described by the Navy, this program "consists of many types of educational materials (DVDs, brochures, posters, coloring books, site history

acknowledgement forms) intended to raise awareness of potential [munitions] hazards" at the Site. Draft Final RI/FS Report at 4-1. Such "awareness," one may hope, will discourage people from picking up or otherwise disturbing munitions items that may be found within the Site. The Navy summarily declares that "this type of program has been shown to be effective at many former munitions sites. . . ." *Id*. However, the draft final RI/FS report fails entirely to provide any evidence supporting this conclusion.

Experience with other Navy munitions sites supports exactly the opposite conclusion: that munitions awareness programs cannot stop people from coming into contact with munitions. The Navy's experience with Adak Naval Complex, another munitions site undergoing CERCLA investigation and cleanup, is instructive. Because of the isolated nature of this site in the Aleutian Islands, the limited population on the island, and the limited means of transport to or from the island, Adak Island may present the best possible circumstances for an effective program of munitions education and awareness. A munitions awareness program is a component of the CERCLA remedy selected for Adak. *See* Former Adak Naval Complex Record of Decision for OU B-1 (2001). The munitions awareness program for Adak presently includes an instructional video that every visitor to the island must watch; coloring books, coffee mugs, refrigerator magnets, and other objects distributed to the island population to promote munitions awareness; and warning signs to keep people away from areas more likely to be contaminated with munitions. [Record of Decision, OU B-1, Former Adak Naval Complex (2001)]

Despite all these substantial efforts, the munitions awareness program at Adak has failed to achieve its purposes and function as intended. The Navy concluded in the most recent Five Year Review for Adak (Dec. 2006) that "[l]and use controls are not fully functioning" for the munitions sites.[1]

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[1] In 2006, after hearing of several incidents of unauthorized or improper handling of munitions at Adak, EPA issued an information request to the Navy to collect information on these and other incidents. The Navy responded to this request in April 2006, providing information on incidents including the following:

- May 2003, Navy learned of an incident involving 22 munitions items delivered in a pickup truck to the Adak City Manager. The item had apparently been collected by employees of a fish processor after the employees had trespassed into an area with restricted access. In order to retrieve these items, the employees removed a locked access gate and deliberately violated posted access restrictions.

- September 2004, a Navy contractor discovered a 20mm projectile. The projectile was moved in October to an access-restricted area and buried below ground for later disposition. In January 2005, the Navy determined that the location of the burial was too well known, so the projectile was retrieved and reburied in another location. In October 2005, EOD personnel attempted but failed to relocate the projectile. Later, the projectile was relocated, marked, and left again. In April 2006, the projectile remained at this location, still awaiting disposition.

- February 2005, Navy learned that a non-Navy contractor conducting dredging operations in a local harbor had discovered two expended 90mm cartridge cases. The disposition of the items was unknown, although the Navy concluded that the cartridges had little or no explosive hazard. However, Navy also determined that the contractors had not been provided with or shown the munitions awareness video. Navy Response to U.S. EPA CERCLA 104(e) Information Request (April 2006).

These failures of the munitions awareness program are not unique to Adak or to the Navy. Similar experiences have been reported at other munitions sites, including Ordnance Reef along the coast of Oahu in Hawaii. There, the Army has been working with community groups to implement an "explosives safety campaign," to warn community members about the dangers associated with military munitions. *See, e.g.*, letter from Mark W. Tenter, Brigadier General, U.S. Army, to Doctor Ric Custodio, Waianae Coast Comprehensive Health Center (May 8, 2009). Nevertheless, incidents of unauthorized handling of munitions continue to occur. For example, community members have been known to collect propellant grains, known locally as "Hawaiian jade," for use in making necklaces. See "Army Takes Responsibility for Explosives Found on Oahu Beaches," Environment News Service (Mar. 20, 2007). The chemical constituents of these propellants, including nitroglycerine and nitroguanidine, create hazards of ignitability, with the potential to burn rapidly with intense heat. U.S. Army, Propellant Health Hazards (June 9, 2008).

Given the continuing failures of munitions awareness programs to achieve intended results, it seems remarkable that the Navy would conclude that explosive hazards at Jackson Park are already effectively managed through Land Use Controls, especially where these LUCs rely principally, if not entirely, on yet another munitions awareness program. In a word, the munitions awareness program at Jackson Park can in no way satisfy the regulatory requirement for "reliability" in the NCP. What has failed at other sites will almost certainly fail at this one, eventually. In fact, compared to Adak, LUCs at Jackson Park appear far less reliable. Unlike the isolation of Adak Island in the Aleutian Chain of Alaska, Jackson Park is located within the Puget Sound region of the State of Washington, an area that is home to four million people. *See* Puget Sound Partnership, State of the Sound (2007) at 16. Access to the Site is uncontrolled and the Site is easily accessible by car from State Highway 3 and by water via small craft. People arriving at the Site by car, boat, foot, or other means, perhaps attracted to the shoreline of Ostrich Bay or the park at Elwood Park, may have no warning whatsoever of possible encounters with munitions items at the Site.

Visitors to the Site are in addition to all the people who live there. Jackson Park is a housing complex. It has over 800 housing units, many occupied by young, military families. Indicative of this demographic, the Navy has reported over 100 in-home daycare arrangements within the housing complex. There is also an on-site daycare facility that supports a daily average of 180 children. In order to protect these hundreds of children from explosive hazards

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Consistent with these incidents, the Navy concluded in the most recent Five-Year Review for Adak (Dec. 2006) that "Land use controls are not fully functioning" for the munitions sites. Among the LUCs failing at Adak, the Navy specifically found that "The ordnance awareness training program is not fully functioning as intended by the Record of Decision." NAVFAC Northwest, Second Five-Year Review of Records of Decision, Former Adak Naval Complex (Dec. 2006). This conclusion was supported by numerous findings collected through annual inspections on the island. These inspections routinely found that many island visitors had no knowledge of the requirement to watch the mandatory munitions video. Some visitors and new community members did not even know of the possibility of encountering munitions on the island. *Id*. at 6-66. In 2005, after several years of educational efforts, only half of those surveyed on the island were aware of the munitions video and had seen it. *Id.* at 6-72.

at the Site, the Navy proposes reliance on a munitions awareness program: most prominently, the distribution of a coloring book featuring "Risky Raccoon." Adults will receive color brochures identifying munitions hazards at the Site.

In evaluating the reliability of coloring books and color brochures to keep people away from munitions at Jackson Park, the experience of Adak and other sites must be considered. This experience cautions that munitions awareness may not always translate into munitions avoidance, as posted warnings and other informational devices can always be ignored by individuals. Children in particular may be attracted by discovery of a munitions item and overcome by curiosity, with potentially tragic results. Among the hundreds of children at Jackson Park, at least some will not be able to read or comprehend the warnings on the brochures or coloring books; many will lack the maturity to understanding warnings provided by their parents or other adults. For these children, the proposed munitions awareness program may be completely ineffective. For all other children and adults, given the uncertain link between awareness and avoidance, the proposed munitions awareness program at Jackson Park must be regarded as suspect at best.

Even if it were possible to reach 100% of all residents of Jackson Park, the munitions awareness program would have to achieve this feat continually, perhaps in perpetuity. By the nature of military life, most households are highly transitory. The constant arrival of new residents perpetuates the challenges of instilling munitions awareness in every single resident of the complex. How exactly the Navy will continue to ensure that coloring books, color brochures, and other informational materials reach every single resident of Jackson Park, in 2009 as well as 2010, 2011, 2012, 2013, 2014, 2015, and in every year that the housing complex remains occupied, has never been explained, much less determined to be reliable. If the experience with Adak is any indication, where after years of Navy efforts, only half the island residents had seen the mandatory video, the coloring books and color brochures will ultimately fail to reach all residents of Jackson Park, perhaps not even reaching half.

Beyond the munitions awareness program, two other LUC components have also been suggested on occasion for Jackson Park. One has been identified by the Navy as the "ban on shellfish harvesting in Ostrich Bay." Draft Final RI/FS Report at 4-2. Although unexplained in the draft final RI/FS report, this "ban" is believed to be an advisory from the Kitsap County Health Dept. against the harvesting of shellfish, crab, bottom fish, and rock fish from the side of Ostrich Bay adjacent to Jackson Park. The advisory reflects health concerns related to known bacterial or chemical pollution in the area. The advisory may help to reduce the likelihood of contact between humans and munitions in the intertidal area of the Site, but only if the advisory is fully understood and heeded. That assumption, however, remains uncertain given the observations of human nature at other munitions sites such as Adak Island. Moreover, the advisory, established unilaterally by the Washington State Dept. of Health and Kitsap County Health Dept. could be altered or lifted unilaterally, even if the munitions threat remains the same. As such, the "ban on shellfishing" cannot be considered a reliable means for preventing human exposures to munitions at Jackson Park.

A third LUC component that has been identified off and on for Jackson Park is construction support. This component consisted of Navy instructions for Jackson Park that

required all intrusive construction activities (i.e., digging) to be performed under the oversight of qualified munitions technicians. See Draft/Final RI/FS Report at 4-1. The Navy required such oversight between the years 2003 and 2007. In 2008, after determining such oversight was unnecessary, the Navy unilaterally eliminated this requirement. This unilateral action by the Navy demonstrates that military munitions construction support is not a reliable form of Land Use Control. Even if the Navy were to reinstate the requirement for construction support, such requirement could be eliminated again by the Navy, nullifying any reliability.

2. LUCs may fail to manage explosive hazards under future land uses.

Given all the uncertainties with Land Use Controls in the context of current land uses, the prospect of land use changes at Jackson Park makes LUCs even more unreliable as a means to prevent human encounters with munitions at the Site. Considered together, munitions awareness, fish advisories, and construction support may be expected to provide greater protection than any one LUC component individually. This is consistent with the concept of "layering" as recommended in EPA's guidance on institutional controls. See EPA, "Institutional Controls: A Site Manager's Guide to Identifying, Evaluating and Selecting Institutional Controls at Superfund Sites and RCRA Corrective Action Cleanups," (Sept. 2000) [hereafter, "ICs Guidance"]. However, even if these three combined components worked perfectly to provide sufficient protection from explosive hazards given current land uses at the Site, they may not provide sufficient protection in the future. EPA guidance requires consideration of reasonably anticipated future land uses in remedial planning. See EPA, "Land Use in the CERCLA Remedy Selection Process," OSWER Dir. No. 9355.7-04 [hereafter, "Land Use Guidance"]. In determining the scope of "reasonably anticipated future land use," the current land use is only one of many factors to consider. Other factors relevant to Jackson Park will be evaluated below.

a. Federal Control.

The EPA Land Use Guidance recommends considering the degree of federal control over lands when determining anticipating future land uses. The guidance posits a spectrum of control from national parks with minimal control to some military facilities with maximum access restrictions. Within this spectrum, Jackson Park appears closer to national parks. There is, in fact, a park at Jackson Park, on a thumb of land known as Elwood Point. Unlike secured military facilities, there is no guard or gate to control access to Elwood Point or other grounds of the housing complex.

This minimal federal control may become further reduced in the future if the housing complex becomes subject to private control through a Public-Private Venture (PPV). The PPV program, known formally as the Military Housing Privatization Initiative, was authorized by Congress in 1996. 10 U.S.C. § 2871. Through the PPV program, military services are authorized to enter agreements with private developers to own, maintain, and operate family housing via a fifty-year lease. See NAVFAC Powerpoint presentation, "Jackson Park Housing Complex: Plan for Future Operation Public Private Venture," (June 19, 2008) [hereafter, "PPV Powerpoint"]. The prospect

for a PPV program at Jackson Park has arisen in recent years. In November 2005, the PPV concept received a brief mention at a multi-agency "partnering" meeting for OU-3T. See "Meeting Summary: Jackson Park Housing Complex OU 3T Project Team Meeting" (Nov. 28, 2005) at 3. Since that time, the PPV concept has received considerably more attention and discussion among the Navy, EPA, and other interested partners including the Suquamish Tribe and State of Washington Dept. of Natural Resources (DNR). Such discussions included a specific briefing on the PPV concept from the Navy on June 19, 2008, and written communications from the Navy dated August 28, 2008, and Jan. 26, 2009.[2]

Anticipating a PPV concept for Jackson Park, the Navy appears to have laudable ideas for effecting Land Use Controls through contractual agreements with the PPV partner. For example, the Navy suggests that through a property management agreement, it could direct the PPV partner to include munitions awareness requirements in tenant leases. PPV Powerpoint at slide 10. The problem with this is that it adds yet another layer of promises to try to keep people away from munitions, instead of addressing the munitions directly. These promises may easily fail to achieve the intended objective of munitions awareness, even if the promises are made enforceable through legal documents.

In this regard, the Navy's recent experience with enforceable land use restrictions at the Puget Sound Naval Shipyard (PSNS) is instructive. Like Jackson Park, PSNS is a listed Superfund site. Consistent with a Record of Decision for PSNS Operable Unit D, institutional controls were established through a restrictive covenant included on a deed transferring the property from the Navy to the City of Bremerton in February 2006. Among other things, the covenant provided explicit instructions for any construction activities on the property, including prior notice to EPA and a prohibition against removing soil from the site. Nevertheless, and despite these explicit, enforceable instructions, the City of Bremerton fell into violation with these requirements within a matter of just a few weeks. *See* letter from Sheila Eckman, EPA, to Robert Lubovich, City Attorney (Oct. 10, 2006). This case was most disturbing because EPA and the Navy had coordinated on the language of the restrictive covenant, ensuring consistency with state property law, and believed this covenant presented the best case for reliable institutional controls. The failure of institutional controls in this best-case scenario raises

[2] On May 12, 2009, EPA received notice that the Navy had "stopped considering privatization of Navy family housing at Jackson Park." Email from Capt. Bob Schlesinger, U.S. Navy, to Dan Opalski, U.S. EPA Region 10 (5/12/09). Reasons given for this reversal include the impacts of the current economic downturn on the developing partnership and also the Navy's lack of funding to study the feasibility of a PPV program for Jackson Park. Such reasons seem entirely reasonable in the current economic climate, which has resulted in a slowdown in housing development, without question. However, housing markets, like the economy in general, are subject to cycles of rising and falling supply and demand. Some believe the U.S. economy may already be poised for recovery. *See, e.g.*, Jeannine Aversa, "End of Recession Seen This Year," Seattle Times (May 27, 2009). Whenever the U.S. housing market does recover, whether in the next year or longer, it is certainly reasonable to anticipate that the PPV concept will also return for Jackson Park.

serious concerns for the reliability of other forms of land use controls, including otherwise laudable provisions in a property management agreement with a PPV partner.

Given all these changes that may be reasonably anticipated as a consequence of a Public-Private Venture at Jackson Park, EPA cannot agree that the existing or proposed Land Use Controls provide an adequate response for potential explosive hazards at Jackson Park.

b. Cultural Factors.

In addition to the degree of federal control at a site, another element to consider when determining "reasonably anticipated future land use" is the potential for "cultural factors." These are described by EPA guidance to include such factors as "historical sites [or] Native American religious sites." Land Use Guidance at 5. The land and intertidal area presently encompassing Jackson Park holds extraordinary historical and cultural value to the Suquamish Tribe. Confirming this extraordinary historical value, the Tribe is specifically proposing part of Jackson Park for inclusion on the National Register of Historic Places, citing listing criteria including "Traditional Cultural Property." The Tribe considers this area to lie within its usual and accustomed fishing area, as specified in the Point Elliott Treaty of 1855. Letter from Denice Taylor, Suquamish Tribe, to Mark Murphy, NAVFAC Northwest (Nov. 24, 2008). Consistent with its treaty rights and historical use, the Tribe would like to see the intertidal area returned to full use by tribal members. *Id*. Such a return of land use would require lifting of the "ban on shellfishing" upon which the Navy proposes to rely indefinitely as part of its package of Land Use Controls for OU-3T-JPHC.

Given the extraordinary historical and cultural value to the Suquamish Tribe, it is certainly reasonable to anticipate future land uses including shellfish harvesting within the intertidal area of Jackson Park. The Tribe's exercise of this treaty right, however, is antithetical to the ban on shellfishing. Respect for the treaty right thus suggests that the shellfishing ban cannot be relied upon as a long-term solution for preventing munitions hazards at Jackson Park.

The FFA for Jackson Park requires all primary documents, such as the present draft final RI/FS report for OU-3T-JPHC, to be "prepared in accordance with the NCP and applicable EPA guidance." FFA Para. 5.3.1. In the context of developing the Navy's Alternative 2, "Existing Land Use Controls," one such applicable guidance is EPA's ICs Guidance (Sept. 2000). In the parlance of this ICs Guidance, the Navy's munitions awareness program fits within the ICs category of "Informational Devices." ICs Guidance at 4. Construction support and the fish advisory fall under the ICs category of "Governmental Controls." Id. at 3-4. The Navy's "Land Use Controls" for Jackson Park thus fit within the applicable requirements for institutional controls established by the ICs Guidance. This guidance establishes a fundamental tenet prospective ICs must be evaluated as thoroughly as any other remedial alternatives within a Feasibility Study. ICs Guidance at 2. Through the draft final RI/FS report for OU-3T-JPHC, the Navy has failed to provide a thorough evaluation of its institutional controls alternative, "Existing

Land Use Controls." Had it provided a thorough evaluation as required, the Navy would have concluded inescapably that "Existing Land Use Controls" is not a reliable alternative for managing explosive hazards for OU-3T-JPHC, for all the reasons articulated above. As such, the Navy's "Existing Land Use Controls" alternative fails the NCP criteria for "long-term effectiveness and permanence." NCP § 300.430(e)(9)(iii)(C). Accordingly, because the Navy continues to insist otherwise without serious analysis, EPA is compelled to invoke formal dispute on this issue.

B. The draft final RI/FS does not reflect "the product of consensus to the maximum extent possible."

Consistent with the model FFA, the Jackson Park FFA establishes procedures for the review and comment on draft documents. FFA Section V. These FFA procedures are premised upon coordination among Navy and EPA project managers. For example, prior to the preparation of any draft document, the FFA provides that the Navy and EPA project managers "shall meet to discuss the report results in an effort to reach a common understanding, to the maximum extent practicable . . . ." FFA Para. 5.5. For the review and comment on draft final documents, such as the draft final RI/FS for OU-3T-JPHC, the FFA requires a considerably greater level of coordination, providing that a draft final report "shall be the product of consensus to the maximum extent *possible*." FFA Para. 5.7.4 (emphasis added).[3]

Plainly, it is possible for the Navy to include a treatment alternative, consistent with EPA's comments, into the RI/FS for OU-3T-JPHC. The word "possible" is hardly ambiguous and, according to the canons of construction, should be given its ordinary meaning in a legal agreement such as the Jackson Park FFA.[4] The Navy has not suggested that evaluation of a treatment alternative is impossible or even hard. Quite to the contrary, the Navy has conducted the necessary field work and completed a remedial investigation report for this Operable Unit. The only effort that appears to be lacking at this time is the required analysis and word processing to define treatment alternatives and evaluate them according to the NCP.

To assist the Navy with this effort, EPA has already proceeded to define the treatment alternatives that it believes are appropriate to this Operable Unit, in satisfaction of NCP requirements. Among other venues and contexts, these treatment alternatives were presented to the Navy in an "EPA Counter Proposal" dated March 19, 2009. These

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[3] On the distinction, long recognized by courts, between "practicable" and "possible," *see, e.g.*, State ex rel. Spokane Int'l R. Co. v. Kuykendall, 128 Wash. 88, 222 P. 211 (1924) (the word 'Practicable" is not synonymous with 'Possible' because 'A thing practicable must necessarily be possible, but a thing may be possible that is not practicable.').

[4] *See, e.g.*., Camenetti v. U.S., 242 U.S. 470 (1971) (where the meaning of operative language is plain and clear, *"the sole function of the courts is to enforce it according to its terms" so that "the duty of interpretation does not arise").* If there were any doubt about the meaning of the word "possible" in the context of a legal agreement such as the Jackson Park FFA, canons of construction would advise applying the "plain meaning" or dictionary definition of the word. One such definition is "capable of taking place or being done without offense to nature . . .." WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 1988). The Navy can make no claim that inclusion of a treatment alternative in the RI/FS for OU-3T-JPHC would constitute an "offense to nature."

treatment alternatives were designated as "Alternative 1A—Upland Clearance" and "Alternative 1B—Inter-tidal Clearance." In a meeting to discuss these alternatives during the informal dispute resolution, the Navy acknowledged their ability to incorporate these alternatives into a revision of the RI/FS for OU-3T-JPHC. However, in a letter from the Navy dated May 13, 2009, the Navy announced its final decision to reject EPA's treatment alternatives, refusing to incorporate them into the RI/FS.

The Navy could have included EPA's treatment alternatives in the RI/FS. It was not impossible. For whatever reasons, with whatever legitimacy, they just didn't want to. The Navy clearly rejected an opportunity for consensus with EPA and thus failed to meet the unambiguous FFA requirement to produce a draft final RI/FS reflecting "the product of consensus to the maximum extent possible."

VI. CONCLUSION

Resolution of the present dispute does not require consensus on the final remedial alternative for Jackson Park OU-3T-JPHC. Consistent with CERCLA, the NCP, and relevant EPA guidance, the final remedial alternative can only be selected after a Proposed Plan, an opportunity for public comment, and a Record of Decision. *See* CERCLA Section 117, NCP at 40 CFR 300.430(f). Resolution does require consensus on the alternatives for evaluation in the FS. For the reasons stated above, EPA believes that CERCLA, the NCP, and EPA guidance require inclusion and evaluation of treatment alternatives as described by EPA. These alternatives have been articulated by EPA in writing as Alternative 1A and 1B. Through formal dispute resolution initiated by this Written Statement of Dispute, EPA seeks to compel inclusion of these alternatives in the final RI/FS for OU-3T-JPHC.